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IN THE COURT OF APPEALS OF INDIANA

JOSEPH RUSHING,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 27A02-0602-CR-75
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Randall L. Johnson, Judge
Cause No. 27D02-0409-FA-121

September 6, 2006

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Joseph Rushing ("Rushing") was convicted by a jury in Grant Superior Court of Class A felony child molesting. Rushing appeals, claiming there is insufficient evidence to support his conviction. We affirm.

Facts and Procedural History

On the afternoon of July 2, 2004, R.B. ("Mother") went to Rushing's house with her boyfriend, Derek Rushing ("Derek"), her two daughters, L.B. and A.B., and her young cousin. Mother, Derek and Rushing consumed beers and smoked marijuana while the children were playing. In Rushing's house there were three bedrooms in a row on the ground floor. The children fell asleep in the middle bedroom. Rushing then led Mother and Derek to his bedroom at the back of the house for them to sleep there for the night.

After Rushing left the back bedroom, Mother sat on the bed for a moment. She then went to check on the girls, who were still sleeping in the middle bedroom. L.B. was no longer in the middle room, so Mother went to look for her. She found L.B. on the floor in the room where Rushing was supposed to be sleeping with her legs spread apart and Rushing's head in her crotch. Mother testified she heard "licking sounds" and saw Rushing's tongue touch L.B.'s vagina.

On September 21, 2004, the State charged Rushing with six counts of child molesting, four as Class A felonies and two as Class C felonies. Appellant's App. pp. 9-13. The alleged victims were L.B., age 4, and A.B, age 3. Appellant's App. pp. 14-17. On July 7, 2005, the State filed Count 7, an habitual offender enhancement. Appellant's App. pp. 50-51. At a hearing on September 26, 2005, the State conceded that the two

alleged victims would not be competent witnesses at trial. Therefore, the State dismissed all but Count 1. Appellant's App. p. 56.

A jury trial commenced on October 18, 2005. The jury found Rushing guilty of Class A felony child molestation. The trial court sentenced Rushing to a maximum term of fifty years on November 14, 2005. Appellant's App. pp. 121-24. Rushing now appeals. Additional facts will be provided as necessary.

Discussion and Decision

On appeal, Rushing contends there was insufficient evidence presented at trial to support his conviction. In reviewing a sufficiency of the evidence claim, we neither reweigh the evidence nor assess the credibility of the witnesses. Love v. State, 761 N.E.2d 806, 810 (Ind. 2002). We look to the evidence most favorable to the verdict and reasonable inferences drawn therefrom. Id. We will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt. Id.

Specifically, Rushing argues that the rule of incredible dubiosity applies because Mother's testimony was "so inherently implausible that it rises to the level of being insufficient." Br. of Appellant at 5.

> Within the narrow limits of the "incredible dubiosity" rule, a court may impinge upon a jury's function to judge the credibility of a witness. If a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed. This is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity. Application of this rule is rare and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it.

Love, 761 N.E.2d at 810 (internal citations omitted).

Rushing contends that Mother's testimony was inherently implausible because the acts she described could not have been performed in a matter of seconds, as she had testified. On cross examination, Mother was asked how much time had elapsed between the time when Rushing left her and Derek in the back bedroom and when she went to check on the girls. She responded, "long enough, just like, two seconds, five seconds, whatever, I didn't count it down[.]" Tr. p. 225. When further pressed about the length of time, Mother replied, "It might have been longer that I set on the bed, but I know what I seen." Tr. p. 226. This testimony was not so incredibly dubious or inherently improbable that no reasonable person could believe that Rushing had adequate time to take L.B. from her room and to the front room, pull down her pants and start molesting her. It was within the jury's province to evaluate Mother's testimony and to conclude that her account of the events was credible.

Moreover, we disagree with Rushing's contention that Mother's testimony is inherently implausible because she testified she had consumed alcohol and smoked marijuana on the night in question. It is within the province of the jury to weigh the credibility of a witness who was intoxicated at the time of the incident. Dobbins v. State, 721 N.E.2d 867, 875 (Ind. Ct. App. 1999).

The evidence presented was not so incredibly dubious or inherently improbable that no reasonable person could believe it. Therefore, the doctrine of incredible dubiosity does not apply to this case. Accordingly, we conclude that the evidence is sufficient to support Rushing's Class A felony child molesting conviction.

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.